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IN THE
COURT OF APPEALS OF INDIANA

MOLLY ALLEN, JOE M. GILSTRAP, THOMAS G. GRIER, JAMES H. NELSON, DONALD K. OWENS, RICHARD K. PATIERNO, RICHARD K. PATIERNO, JR., SILVINE M. PATIERNO and JOHN M. STONE,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 29A02-0608-CV-645
GREAT AMERICAN RESERVE INSURANCE COMPANY and CONSECO INSURANCE COMPANY, a Wholly Owned Subsidiary of Conseco, Inc.,	)	
Appellees-Defendants.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-9709-CP-751

October 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Molly Allen and a number of other subagents who sold a Flex II annuity for the Great American Reserve Insurance Company ("GARCO") sued GARCO, asserting they had incurred liability to their customers and were subjected to costs of regulatory proceedings and defense of civil lawsuits because GARCO misrepresented that the Flex II had no front-end load.[1] The trial court granted partial summary judgment for GARCO on most of the counts on the ground the subagents could not have reasonably relied on the claimed misrepresentations. Our Supreme Court remanded after it determined, among other things, factual issues precluded summary judgment on several claims. *Allen v. Great Am. Reserve Ins. Co*., 766 N.E.2d 1157 (Ind. 2002).

On remand, the subagents amended their complaint and sought a determination by the trial court that the Flex II does not have a front-end load. GARCO brought a partial motion to dismiss. The trial court found the policy did have a front-end load and granted the partial motion to dismiss. The subagents appeal, presenting as "[t]he sole issue in this appeal . . . whether the Flex II annuity should be construed to include a front-end load." (Appellants' Br. at 19.)

The issue the subagents raise has already been decided, and we decline to revisit it. Our Supreme Court has explicitly held the policy in question has a front-end load.

The "law of the case" doctrine is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially the same facts. *Learman v. Auto Owners Ins. Co*., 769 N.E.2d 1171, 1175

[1] A policy with "no front-end load" is one where no commission or other fees are taken out of the premiums paid in the initial years of the policy. *Allen v. Great Am. Reserve Ins. Co.*, 766 N.E.2d 1157, 1160-61 (Ind. 2002).

(Ind. Ct. App. 2002), *trans. denied* 783 N.E.2d 698 (Ind. 2002). On remand from an appellate decision, the law of the case doctrine requires a trial court to "apply the law as laid down by the appellate court." *Id*.

The law-of-the-case doctrine stands for the proposition that facts established at one stage of a proceeding, which were part of an issue on which judgment was entered and appeal taken, are unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage. *In re Adoption of Baby W.*, 796 N.E.2d 364, 372 (Ind. Ct. App. 2003), *reh'g denied*, *trans. denied*. The purpose of this doctrine is to promote finality and judicial economy. *State v. Lewis*, 543 N.E.2d 1116, 1118 (Ind. 1989). The doctrine of the law of the case is applied only to those issues actually considered and decided on appeal. 4A Kenneth M. Stroud, Indiana Practice § 12.10 (2d ed. 1990). The parties have the right to introduce new evidence and establish a new state of facts; when this is done, the prior appellate decision ceases to be the law of the case. *Egbert v. Egbert*, 235 Ind. 405, 415, 132 N.E.2d 910, 916 (1956).

The subagents attempt to avoid the law of the case doctrine by arguing:

> The Supreme Court did not undertake to construe the Flex II policy or apply any of the numerous rules applicable to construction of insurance policies in Indiana. The Court did not quote any language from the Flex II policy or apply any analysis that might suggest that the Court was construing the policy. No holding of the Court related to the construction or interpretation of the Flex II policy.

(Appellants' Br. at 47.) They mischaracterize the prior *Allen* decision.

In *Allen v. Great American Reserve Ins. Co.*, 739 N.E.2d 1080 (Ind. Ct. App. 2000), *vacated* 766 N.E.2d 1157 (Ind. 2002), we noted the general agent, Guffey, trained

the subagents how to sell the Flex II. As part of this instruction he told the subagents the Flex II had no front-end load, *i.e.*, that no commission or other fees were taken out of premiums paid in the initial years of the policy.

We found otherwise:

> The Flex II policy, however, stated that the "percentage of each premium which will be accumulated at interest to determine the cash value" was 65% in the first year and 87.5% for years two through five for a policyholder under age 59. R. at 1193. Thus, the policy language revealed a front-end load fee.

Id. at 1082. We then held the subagents could not have reasonably relied on Guffey's misrepresentations about the front-end load:

> The plain terms of the Flex II show that the policy's guaranteed cash value does not exceed the premiums paid until the seventh year of the policy's life. . . . The Subagents are held to have known about the front-end load and, hence, cannot complain that they suffered fraud through reasonable reliance.

Id. at 1085-86.

On transfer, our Supreme Court evidently adopted that interpretation of the policy language:

> In exchange for annual premiums, the Flex II promised annuity income in the future. Guffey trained the plaintiffs, and part of that instruction included telling the plaintiffs that the Flex II had no front-end load, meaning that no commission or other fees would reduce the amount of premiums used to build up the value of the policy. In fact, the Flex II did have a front-end load, and for most policyholders only 65% of the first year's premium was applied to add to the value of the policy. Just over 85% was applied in years two through five, and only in year six did the entire premium go to enhance the value of the annuity. After some of the plaintiffs' customers complained about misrepresentations in the sale of the Flex II, the South Carolina Department of Insurance launched an investigation. As a result of the investigation, most of the plaintiffs entered

> into consent decrees with the department admitting that they had misrepresented the Flex II as to the existence of a front-end load.

766 N.E.2d at 1160-61. Our Supreme Court also noted "all parties agree that the policies in fact carried a front-end load." *Id*. at 1161.[2]

The subagents now assert they argued before our Supreme Court that "properly construed, the Flex II policy was not a front-end load annuity." (Appellants' Br. at 46.) As authority they direct us to a three-page excerpt from the Supreme Court oral argument. (Appellants' App. at 148-150.) Nowhere in that excerpt do the subagents explicitly argue the policy did not have a front-end load, nor is it apparent they even implicitly so argued.[3]

Finally, the subagents assert "the issue decided by the Supreme Court [in *Allen*] was narrowly framed," (Appellants' Br. at 47), as whether there were questions of fact about the reasonableness of the subagents' reliance on GARCO's representations there was no front-end load. They note the law of the case doctrine does not apply when "new evidence and new facts are discovered after an earlier ruling," (*id*. at 48), or to new theories not presented in the prior appeal, (*id.*) (citing *Cutter v. State*, 725 N.E.2d 401, 405 (Ind. 2000), *reh'g denied*). Specifically, they note their amended complaint alleged GARCO was "equitably estopped to administer the Flex II policy as if it had a front-end

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[2] In *Am. Home Assur. Co. v. Allen*, where we addressed a different dispute among these parties, we again noted, "In fact, the Flex II did have a front-end load." 814 N.E.2d 662, 664 (Ind. Ct. App. 2004), *reh'g denied, trans. dismissed.*

[3] The subagents also assert "the briefing presented to the Supreme Court showed that the parties did not agree about the proper legal construction of the Flex II policy." (Appellants' Br. at 47.) The Subagents do not direct us to anything in the record to support this assertion.

load." (Appellants' Br. at 48.) They do not explain why this new theory is not precluded by the Supreme Court's prior holding that "[i]n fact, the Flex II did have a front-end load." 766 N.E.2d at 1161.

The determinations by this court and our Supreme Court that the Flex II policy had a front-end load are the law of the case, and the trial court was obliged to so find in considering the subagents' amended complaint on remand. We accordingly affirm.

Affirmed.

SHARPNACK, J., and BAILEY, J., concur.